

Dated: January 30, 2003

TABLE OF CONTENTS

SUMMARY	iii
BACKGROUND	1
JURISDICTION	2
FACTS	3
ARGUMENT	5
A. The Ordinance Violates 47 U.S.C. § 253(a)	5
B. The Ordinance is Not Competitively Neutral, and Therefore Does Not Meet the Requirements of thr § 253(b) “Safe Harbor”	8
C. The Ordinance Discriminates against Competitive Providers, and the Fees Imposed are Neither “Competitively Neutral and Non- Discriminatory” Nor “Fair and Reasonable,” and Therefore the Ordinance Does Not Meet the Requirements of the § 253(c) “Safe Harbor”	9
CONCLUSION	14

SUMMARY

Fibertech is a certificated provider of competitive telecommunications services in Pennsylvania, and has recently completed construction of its network in the Pittsburgh metropolitan area. Less than one mile of Fibertech's Pittsburgh aerial network passes through the Borough of Blawnox on utility-owned poles in the State Highway Department rights-of-way.

Blawnox has threatened to take steps to remove Fibertech's facilities unless Fibertech agrees to pay a recurring annual "Franchise Fee" of \$2.50 per foot (\$13,200.00 per mile) of Fibertech's aerial plant, as required by the Borough's Rights of Way Ordinance.

The Ordinance is illegal under state law, in that: (a) the regulation of facilities in the State Highway right-of-way is the province of the Highway Department, and (b) the Pennsylvania PUC has exclusive authority to assess fees on providers of telecommunications services.

Also, Fibertech asserts that the Ordinance is not applied ILECs, and therefore the Borough's attempt to enforce the Ordinance against Fibertech also violates 47 U.S.C. § 253(a) because it will have the effect of prohibiting Fibertech and other competitive service providers from competing with the ILECs. The Ordinance is not "competitively neutral and nondiscriminatory", nor is the annually recurring \$13,200.00 per mile Franchise Fee "fair and reasonable compensation" for the presence of a single cable on previously-existing, utility-owned poles in public rights-of-way administered by and under the authority of the State Highway Department.

Thus, the Ordinance fails to fall within any "Safe Harbor" and should therefore be preempted under 47 U.S.C. § 253(d) as an unlawful barrier to competition.

3. By order of the Pennsylvania Public Utility Commission (the “PUC”) dated May 21, 2001, Fibertech has been granted Certificates of Public Convenience:

- (1) **As** a Reseller of Interexchange Toll Services (“IXC Reseller”) throughout the Commonwealth;
- (2) As a Reseller and Facilities-Based Competitive Local Exchange Carrier (“CLEC”) in the service territory of Verizon Pennsylvania, Inc.;
- (3) **As** a Competitive Access Provider (“CAP”) throughout the Commonwealth; and
- (4) As a Facilities-Based Interexchange Carrier (“Facilities-Based IXC”) throughout the Commonwealth.²

4. Fibertech has recently completed the construction of its fiber optic network in the Pittsburgh, Pennsylvania metropolitan area. With over 150 route-miles of broadband fiber network, Pittsburgh is Fibertech’s largest network to-date, encompassing the Pittsburgh central business district and traveling through a vast number of municipalities to reach over 25 Verizon central offices

5. One of the municipalities along Fibertech’s Pittsburgh network is the Borough of Blawnox, Pennsylvania. As part of its construction of the Pittsburgh network, Fibertech installed approximately two-thirds (2/3) of a mile of aerial network in the state highway right-of-way through Blawnox.

JURISDICTION

6. The Commission has jurisdiction of this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 253 of the Federal Communications Act of 1934, as amended. 47 U.S.C. § 253.

FACTS

7. On or about March 12, 2002, Blawnox's outside counsel sent a letter to Fibertech advising Fibertech of Borough Ordinance No. 529 (the "Ordinance"). Copies of the March 12 letter and the Ordinance are attached hereto as Exhibit "A" and Exhibit "B" respectively.

8. On or about April 26, 2002, Fibertech's Director of Government Affairs and Facilities Access sent a letter to the Borough's outside counsel informing him that Fibertech provides a telecommunication service and is regulated by the Commonwealth of Pennsylvania Public Utility Commission and has a certificate of public convenience from the PUC. A copy of the April 26th letter is attached hereto as Exhibit "C".

9. On or about May 30, 2002, the Borough's outside counsel sent a letter to Fibertech along with a document captioned "Certification -- Telecommunications Providers". The stated purpose of this "Certification" was to establish Fibertech's qualifications under the Borough's Rights of Way Ordinance. A copy of the May 30th letter is attached hereto as Exhibit "D".

10. On or about August 9, 2002, Fibertech completed the "Certification" and forwarded the completed Certification to Blawnox. A copy of Fibertech's completed Certification is attached hereto as Exhibit "E".

11. On or about September 6, 2002, Blawnox's outside counsel sent correspondence to Mr. Rodriguez stating that "[t]he Borough is proceeding with evaluating your company's request for exemption from compliance with the Borough's Rights of Way Ordinance" and

² See *Order of Pennsylvania Public Utility Commission re Applications of Fiber Technologies Networks, L.L.C.*, Docket Nos. **A-311101**, **A-311101F0002**, **A-311101F0003** and **A-311101F0004** (entered Sept. 28, 2001).

requesting additional information. A copy of the September 6th letter is attached hereto as Exhibit "F".

12. On or about October 17, 2002, the Borough forwarded an invoice to Fibertech, alleging that Fibertech owed Blawnox \$8,900.00 as an annual fee for the 3,560 feet of aerial fiber optic cable in the State right-of-way through the Borough of Blawnox. A copy of the invoice is attached hereto as Exhibit "G".

13. On or about November 12, 2002, Fibertech's counsel telephoned the Borough's outside counsel and made inquiry as to the authority of the Borough to impose fees for facilities located in the State highway right-of-way. In this discussion, Fibertech's counsel directed the Borough's counsel to two Pennsylvania court cases: Pennsylvania Power & Light Co., v. Mahanoy Township, 33 Pa. D. & C.2d 268 (1963), and Bell Telephone Co of Pennsylvania v. Bnstol Township, 54 Pa. D. & C.2d 419 (1971). In brief, the Pennsylvania Power case nullified a municipal ordinance regarding the erection of new poles, towers, structures or lines, wires, or cables thereon carried as it applied to facilities erected along State highways, stating "it is the Pennsylvania Department of Highways and not a [municipality] that determines whether utility poles shall be erected in a [municipal] highway." Pennsylvania Power, 33 Pa. D. & C.2d at 272. Fibertech complied with the requirements of the Pennsylvania Department of Highways in constructing its facilities in the State Right-of-way. The Bell Telephone case concluded that the right to tax communications facilities fell in the exclusive jurisdiction of the PUC and "therefore, the power to enact such regulation by the municipality has been usurped." Bell Telephone, 54 Pa. D. & C.2d at 428. Fibertech has complied with all requirements of the PUC in constructing its facilities.

14. On or about December 12, 2002, the Borough's outside counsel forwarded a letter to Fibertech's counsel attempting to distinguish the two cases referenced above and making demand for payment of the \$8,900.00 to Borough. A copy of the December 12th letter is attached hereto as Exhibit "H" (the "December 12th Letter").

15. On or about December 24, 2002, the Solicitor for Blawnox sent a letter to Fibertech alleging violation of the ordinance and stating that if payment was not received within 30 days the Borough would take legal action to "correct [*sic*]any and all franchise fees as well as request the removal of any equipment of your organization from its public rights of way." A copy of the December 24th letter is attached hereto as Exhibit "I". The referenced bill and ordinance are the Invoice and Ordinance referenced above and attached hereto as Exhibit "B" and Exhibit "G" respectively.

ARGUMENT

A. The Ordinance Violates 47 U.S.C. § 253(a)

16. Congress was specific in its intent that the Commission eliminate market entry barriers "in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services." 47 U.S.C. § 257(a). In furtherance of this goal, Section 253(a) provides that:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a). “Courts have held that a prohibition does not need to be complete or ‘insurmountable’ to run afoul of §253(a).”³ Rather, the analysis is “‘whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.’”⁴

17. The Ordinance enacted by the Borough excludes, by its own terms, application to Incumbent Local Exchange Carriers (“ILECs”) in that it excludes from the “Telecommunications Services” to which it applies:

A specific Telecommunications Service regulated by the Commonwealth of Pennsylvania Public Utility Commission as a public utility for which a certificate of public convenience has been obtained and a tariff therefor has been filed.

Ordinance at Section I.1(P)(b)(2). Although Fibertech furnished the Borough with copies of Certificates of Public Convenience and four (4) tariffs in support of the exclusion of Fibertech from the Ordinance’s requirement, the Borough’s December 12th Letter attempts to create a distinction by pointing to a provision in the tariffs providing for Individual Case Basis (“ICB”) pricing in special situations.⁵

18. Upon information and belief, all services provided by the ILEC are provided subject to a tariffed rate and therefore the ILEC is exempt from the Borough’s regulation. But, because of the possibility that Fibertech may provide some services with ICB pricing, the Borough seeks to saddle Fibertech with **a recurring annual per-foot charge that approaches**

³ TCG New York v. City of White Plains, 305 F.3d 67, 76 (2nd Cir. 2002) (“White Plains”) (citing RT Communications, Inc. v. FCC, 201 F.3d 1264, 1268 (10th Cir. 2000)).

⁴ White Plains, 305 F.3d at 76 (quoting Cal. Payphone Ass’n, 12 F.C.C.R. 14191 (1997)).

⁵ See December 12th Letter at Page 2.

one-hundred percent (100%) of the cost of constructing aerial facilities on pre-existing poles.

19. In the alternative, upon information and belief, even if an ILEC: (a) provides some services based upon ICB pricing; (b) provides services that are not regulated by the PUC; or (c) provides services that are outside of the scope of the ILEC's filed tariffs; the Borough has not and does not subject the ILEC to the Franchise Fee provisions of the Ordinance. Thus, the Ordinance enables the incumbent to maintain, upgrade, and extend its network at a substantially lower cost than Fibertech.

20. The Ordinance prescribes disparate treatment for Fibertech by imposing increased operational costs to which the ILEC is not subjected. Such disparate treatment is not competitively neutral and nondiscriminatory, as required by Section 253 of the Act. It impedes Fibertech's ability to effectively compete with the ILEC. By preventing Fibertech, in such a drastic way, from doing business in a "fair and balanced legal and regulatory environment,"⁶ the Ordinance prohibits, or has the effect of prohibiting, Fibertech from providing service in competition with the ILEC, thus creating a barrier to entry in violation of Section 253(a).

21. Such a finding is consistent with the Commission's decision in the analogous case of Western Wireless.⁷ Although the Western Wireless case dealt with universal service support provided to ILECs, its analysis of the impact of governmental preferences to ILECs holds true in this case:

⁶ White Plains, at 76.

⁷ Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934. Memorandum Opinion and Order, FCC-00-309 (rel. Aug. 28, 2000) ("Western Wireless").

A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the state government that is not available to the new entrant. A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-provided service relative to competitor-based service by an amount equivalent to the amount of the support provided to the ILECs that was not available to their competitors. Thus, non-ILECs would be left with two choices – match the ILEC’s price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price based on the unsubsidized cost of providing such service. A mechanism that provides support to ILECs while denying funds to eligible prospective competitors thus may give customers a strong incentive to choose service from ILECs rather than competitors . . . a [competitive] carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its state government-imposed competitive disadvantage. Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of Section 253.⁸

Whether in the form of support payments, or in the form of exemption from Franchise Fees (as is the case here), such governmental preferences have a very real impact on the ability of entities to provide competitive communications services

B. The Ordinance is Not Competitively Neutral, and Therefore Does Not Meet the Requirements of the § 253(b) “Safe Harbor”

22. The Section 253(b) “Safe Harbor” allows states to impose requirements that are (1) competitively neutral, (2) consistent with Section 254 (pertaining to Universal Service), and (3) “necessary to preserve and advance Universal Service, protect the public safety and welfare, ensure the continued quality of telecommunications services, **and** safeguard the rights of

⁸ Western Wireless at Paragraph 8.

consumers.”” The Commission has “preempted State regulations for failure to satisfy even one of the three criteria.””

23. The Ordinance is a local requirement of the Borough, not a State requirement. Nor has the Commonwealth of Pennsylvania delegated this authority to the Borough. As stated in Paragraph 13 above, the Ordinance is illegal under Pennsylvania law.” Therefore, the Ordinance is not imposed by the State and does not fall within the § 253(b) Safe Harbor.

24. Even assuming, *arguendo*, that the Ordinance is allowable under Pennsylvania law and could be considered an act of the State, the Section 253(b) Safe Harbor is not applicable to this case in that: (1) the Ordinance, both by its specific terms and in its application, discriminates against Competitive Service Providers in favor of the ILEC, and is therefore not competitively neutral, (2) the Ordinance does not pertain to Section 254, and (3) the Ordinance does not preserve and advance Universal Service, protect public safety and welfare, ensure quality telecommunications services, and safeguard the rights of consumers. Thus, the Ordinance fails to meet any of the criteria necessary to fall within the § 253(b) Safe Harbor.

C. The Ordinance Discriminates against Competitive Providers, and the Fees Imposed are Neither “Competitively Neutral and Non-Discriminatory” Nor “Fair and Reasonable,” and Therefore the Ordinance Does Not Meet the Requirements of the § 253(c) “Safe Harbor”

25. To qualify for the Section 253(c) “Safe Harbor”, any compensation required must be publicly disclosed and the underlying regulation must be:

- (1) “to manage the public rights-of-way”

⁹ 47 U.S.C. § 253(b) (emphasis added); *see also* Western Wireless at Paragraph 9.

¹⁰ Western Wireless at Paragraph 9.

¹¹ *See* Pennsylvania Power and Bell Telephone, *supra*. As stated in Paragraph 13 above, Fibertech has complied with the requirements of the Pennsylvania Department of Highways and the PUC in the construction of its facilities.

or

- (2) “to require fair and reasonable compensation from telecommunications providers”,

and

- (3) “on a competitively neutral and nondiscriminatory basis” and “for use of public rights-of-way on a nondiscriminatory basis.”

26. However, the recurring annual fee complained of herein fails to fall within those exceptions, as follows:

- (1) Management of Public Rights-of-way. The Commission has stated that the authority of local governments to manage the public rights of way includes¹²:

perform[ing] the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. We have previously described the types of activities that fall within the sphere of appropriate rights-of-way management in both the Classic Telephone Decision and the OVS Orders, [footnote omitted] and that analysis of what constitutes appropriate rights-of-way management continues to set the parameters of local authority. These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.¹³

However, the recurring annual fee complained of herein is outside of the scope of these types of administrative tasks that have defined the “manage the public rights-of-way”

¹² While the Commission has recognized these management activities can be legitimately undertaken by local governments under federal law, as stated in Paragraph 13 above Fibertech asserts that under Pennsylvania law the Borough is not entitled to: (a) regulate facilities in the State Highway Department’s right-of-way, or (b) assess fees on providers of telecommunications services. See *Pennsylvania Power and Bell Telephone*, *supra*.

¹³ *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief*, Memorandum Opinion and Order, FCC 97-331, at Paragraph 103 (rel. Sept. 19, 1997) (“TCI Cablevision”).

portion of Section 253(c), so this portion of the “Safe Harbor” does not apply to the Borough’s Franchise Fee.

(2) Fair and Reasonable Compensation. Also, the Ordinance fails to meet the Section 253(c) “Safe Harbor” requirements because the recurring fee of \$2.50 per foot (\$13,200.00 per mile) of aerial cable per year that the Ordinance seeks to charge is not “fair and reasonable.” The Franchise Fee set forth in the Ordinance bears no rational relationship to any costs incurred by Blawnox because of the presence of Fibertech’s cable.¹⁴ Moreover, an Ordinance that annually collects almost one-hundred percent (100%) of the original network construction costs merely for the presence of a single cable on previously-existing, utility-owned poles on rights-of-way that are administered by and under the authority of the State Highway Department cannot be deemed “fair and reasonable.” This conclusion is supported by examining the result of applying such a fee across Fibertech’s entire Pittsburgh Network, which would result in a recurring annual fee of more than \$2,000,000.00.¹⁵ Fibertech could not absorb such costs, or pass them on to users of the telecommunications services that Fibertech provides, and therefore such fees would have the effect of prohibiting competition with the ILEC. That the annual \$2.50 per-foot (\$13,200.00 per mile) charge is not “fair and reasonable” is also

¹⁴ See e.g., New Jersey Payphone Association, Inc. v. Town of West New York, 130 F.Supp.2d 631, 637-638 (D.N.J. 2001), *affirmed* 299 F.3d 235 (3d Cir. 2002); Bell Atlantic-Maryland, Inc. v. Prince George's County, 49 F.Supp. 805, 817 (D.Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000); PECO Energy Co. v. Township of Haverford, 1999 WL 1240941,*7 (E.D.Pa. 1999).

¹⁵ Consideration of the consequences of applying the Blawnox ordinance across Fibertech’s Pittsburgh-area network is appropriate not only because any action or standard must be judged by whether it can be applied universally (*see, e.g.,* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (Lewis W. Beck trans., Bobbs-Merrill Co. 1959) (1785) (“There is ... only one categorical imperative. It is: Act only according to that maxim by which you can at the same time will that it should become a universal law”)) but also because, if Blawnox succeeds in demanding payment of a \$2.50 per-foot annual fee, one can expect most if not all other municipalities in the region to adopt similar fees.

underscored by the effect it would have if applied when Fibertech or any other telecommunications provider seeks to deploy facilities throughout the community of Blawnox. Assuming there are an average of 100 homes **per** linear mile of aerial plant in the community, each home could be viewed as served by 52.8 feet of cable (5280 feet of cable per mile divided by 100 homes). In such a case, if the provider were a monopoly provider, it would have to recover \$132.00 per year from each household simply to pay the right-of-way fee (52.8 feet x \$2.50 per foot). The fee's impact would be even more dramatic when the fee is applied to Fibertech or another new entrant. An entrant succeeding in capturing 20% of the households as customers, for example, would have to recover \$660.00 per year from each customer (\$132.00 x 5) to pay the right-of-way fee.

Right-of-way access fees that would make it impossible for a competitor to enter a market certainly cannot constitute fair and reasonable compensation under Section 253(c). Therefore, because the fee is not rationally related to any costs incurred by Blawnox, and because the fee is excessive for the presence of aerial facilities on utility-owned poles in the State Highway Right-of-way, the fee is not "fair and reasonable." Accordingly, this portion of the Section 253(c) "Safe Harbor" also does not apply to the Borough's Franchise Fee.

(3) Competitively Neutral and Nondiscriminatory Basis. **As** stated above, the Ordinance is not competitively neutral in that it requires a new entrant to pay the recurring annual fee while exempting the ILEC. Such a requirement fails to meet the competitively neutral and non-discriminatory requirement prong of the Section 253(c) Safe Harbor. Also, even if the Commission finds some relationship between the \$2.50 annual recurring fee per foot and the costs incurred by the Borough, the application of the

\$2.50 fee to new entrants such as Fibertech results in a disparate impact to new entrants into the market, in that (per the December 12th Letter) the new entrants will be responsible for paying the full recurring annual fee regardless of the amount of non-tariffed services that are carried on their cable and regardless of the amount of end-users (if any) who communicate over their fiber. Further, as illustrated by the comparison of a \$132.00-per-customer annual ILEC cost versus a \$660.00-per-customer annual new entrant cost posited in Paragraph 26(2) above, even if the ILEC were required to pay the fee, the per-customer amount that a new entrant would need to recoup annually in order to pay the fee could be expected to be many hundreds of dollars greater than the per-customer amount that an established ILEC would need to offset the fee. As the United States Court of Appeals for the 2nd Circuit ruled in the White Plains case, “[i]n order for [a municipality] to demand fees, most-favored-vendee status, or similar benefits from [a competitive service provider], it must demand comparable benefits from [the ILEC], taking into account relevant differences in scale of operations and costs incurred.”¹⁶ Thus, the Ordinance is neither competitively neutral nor nondiscriminatory, and therefore it also fails this aspect of the § 253(c) “Safe Harbor.”

27. Because the Franchise Fee set forth in the Ordinance is not: (1) a component of right-of-way management, (2) fair and reasonable compensation, or (3) competitively neutral and nondiscriminatory, the Fee fails to fall within the protection of Section 253(c) and should therefore be preempted by the Commission because it creates a barrier to entry in violation of Section 253(a).

¹⁶ White Plains, 305 F.3d at 80

CONCLUSION

The fee imposed by the Ordinance, requiring an annual payment of \$2.50 per foot (\$13,200.00 per mile) of cable installed in the State right-of-way on utility-owned poles, violates Section 253(a) by imposing on Fibertech a heavy financial burden that is not experienced by the ILEC and thereby would prohibit the ability of Fibertech to provide telecommunications service by denying it the opportunity to compete in a fair and balanced legal and regulatory environment. The fee is not saved by either Section 253(b) or Section 253(c). The fee fails to qualify for the safe harbor defined by Section 253(c) because, as set forth above, it is not fair and reasonable and is neither competitively neutral nor nondiscriminatory.

Because the fee imposed by the Ordinance violates Section 253(a) and is not protected by the Safe Harbor provisions of Sections 253(b) and 253(c), preemption under Section 253(d) is appropriate.

Therefore Fibertech respectfully requests the following relief:

1. That the Commission preempt the Borough from requiring Fibertech to pay the fees required by the Ordinance, whether by conditioning Fibertech's right to maintain its facilities within the Borough upon payment of the fees, or otherwise;
2. That the Commission preempt the Borough from enforcing the Ordinance to restrict the issuance of any permits necessary for further construction of competitive facilities through the Borough;
3. That the Commission preempt the Borough from adopting and enforcing any future right-of-way ordinance imposing fees, conditions and/or restrictions which are


discriminatory or not competitively neutral upon entities seeking to use the public rights-of-way to furnish competitive services;

4. That the Commission preempt the Borough from otherwise engaging in practices which impose in a discriminatory and non-competitively neutral manner costs, delays and/or conditions upon Fibertech and other competitive service providers; and

5. That the Commission grant Fibertech such other, further and general relief as the Commission deems appropriate.

Respectfully submitted,

FIBER TECHNOLOGIES NETWORKS, L.L.C.

By: 

Charles B. Stockdale, V.P. & Corporate Counsel
Robert T. Witthauer, Deputy Corporate Counsel
Fibertech Networks, LLC
140 Allens Creek Road
Rochester, New York 14618
Phone: (585) 697-5100

Its Attorneys

January 30, 2003

CERTIFICATE OF SERVICE

I hereby certify that on January 30th, 2003, I served a copy of the foregoing on the persons listed below by depositing a copy of same in the U.S. Mail, with first class postage paid to:

John F. Cambest, Esq.
BLAWNOX BOROUGH SOLICITOR
1001 Ardmore Boulevard, Suite 100
Pittsburgh, Pennsylvania 15221-5233

Frederick A. Polner, Esq.
ROTHMAN GORDON
Grant Building, 3rd Floor
Pittsburgh, Pennsylvania 15219-2203

A handwritten signature in black ink, appearing to read "C. H. Polner", is written over a horizontal line.

Exhibit “A”

ROTHMAN GORDON

Louis B. Kushner
Thomas R. Solomuch
Stephen H. Jordan
Frederick A. Polner
James R. Farley
Ronald G. Backer
Shelley W. Elowitz
K. Sidney Neuman
Martha A. Zaczalek

Mark S. Wers
Sara A. Mercer
William E. Lestitian
Robert A. Galanter
Paul R. Yagelski
Alan C. Blanco
Bernadene L. Puzzuolo
R. Douglas DeNardo

ATTORNEYS AT LAW

Third Floor, Grant Building
Pittsburgh, Pennsylvania 15219-2203
412 338-1100
412 281-7304 Telefax

DIRECT DIAL: 412 338-1111

Sandra R. Kushner
Thomas L. Donahoe
Phyllis T. Procopio
Holly L. Stabile
Elliot J. Schuchardt
Charles A. Lamberton

Of Counsel
Jack G. Armstrong

Emil W. Herman
1934 - 1999
Norman A. Grouding
1916 - 2000

March 12, 2002

Mr. John K. Purcell, President
FIBERTECH NETWORKS, LLC
140 Allens Creek Road
Rochester, NY 14618

RE: Borough of Blawnox, Pennsylvania

Dear Mr. Purcell:

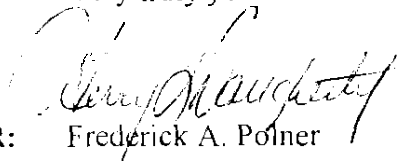
Rothman Gordon represents the Borough of Blawnox, Pennsylvania, in matters of cable television and telecommunications.

The Borough has recently been contacted by your company which has advised it is constructing a fiber optic telecommunications network along Freeport Road within the municipal boundaries of the Borough.

Please be advised that construction of the aforementioned telecommunications network is unlawful unless it is done so in compliance with Ordinance No. 529, a copy of which is enclosed with this letter.

Should you have any questions, or be in need of further information, please contact me.

Very truly yours


FOR: Frederick A. Polner
GERRY L. DAUCHERTY
Legal Assistant

FAP/gld

cc: Borough of Blawnox

Exhibit “B”

ORDINANCE NO. 529

AN ORDINANCE OF THE BOROUGH OF BLAWNOX, COUNTY OF ALLEGHENY, COMMONWEALTH OF PENNSYLVANIA, TO REGULATE ACCESS TO AND ONGOING USE OF PUBLIC RIGHTS-OF-WAY BY TELECOMMUNICATIONS PROVIDERS; ESTABLISHING A COST-EASED FRANCHISE FEE; PROVIDING FOR COMPLIANCE AND MONITORING GUIDELINES; REQUIRING INSURANCE AND INDEMNIFICATION; AND CREATING MECHANISMS FOR ENFORCEMENT.

WHEREAS, pursuant to its powers and under the Borough *code*, as amended, the general supervision of the affairs of the Borough of Blawnox, Commonwealth of Pennsylvania, is in the hands of its Borough Council; and,

WHEREAS, the Borough has the power to regulate the use of the public way⁶ in the Borough, pursuant to 53 P.S. §46202(17); and,

WHEREAS, said Borough Council deems it necessary and advantageous to adopt the within Ordinance.

NOW THEREFORE BE IT ORDAINED, the Borough Council of the Borough of Blawnox, Allegheny County, Pennsylvania, hereby enacts this Rights of Way Ordinance as provided herein.

SECTION 1.

BOROUGH OF BLAWNOX

RIGHTS OF WAY

ORDINANCE

TABLE OF CONTENTS

	PAGE
SECTION 1 DEFINITION OF TERMS	1
1.1 TERMS	1
SECTION 2 GRANT OF FRANCHISE	3
2.1 GRANT	3
2.2 NON-EXCLUSIVE GRANT	3
2.3 NOT A CABLE SYSTEM	4
2.4 NOT A POLE ATTACHMENT AGREEMENT	4
SECTION 3 STANDARDS OF SERVICE	4
3.1 CONDITIONS OF STREET OCCUPANCY	4
3.2 RESTORATION OF PUBLIC WAYS	4
3.3 RELOCATION AT REQUEST OF FRANCHISING AUTHORITY	4
3.4 RELOCATION AT REQUEST OF THIRD PARTY	5
3.5 TREES AND SHRUBBERY	5
3.6 USE OF GRANTEE'S EQUIPMENT BY FRANCHISING AUTHORITY	5
3.7 SAFETY REQUIREMENTS	6
3.8 MAPS	6
3.9 AERIAL AND UNDERGROUND CONSTRUCTION	7
3.10 EXCAVATIONS	7
3.11 INSTALLATION OF SERVICE	7
3.12 MAINTENANCE OF FACILITIES	7
3.13 EMERGENCY USAGE	8
3.14 TECHNICAL PERFORMANCE AND STANDARDS	8
3.15 RESERVATION OF BOROUGH PUBLIC WAYS	8
3.16 COMMON USERS	8
3.17 NOTICE TO COMMON USERS	8
3.18 OCCUPANCY RIGHT	8
3.19 SAFETY STANDARDS FOR LICENSEES	8
3.20 REMOVAL OF EQUIPMENT	8
SECTION 4 REGULATION BY FRANCHISE AUTHORITY	9
4.1 FRANCHISE FEE	10
SECTION 5 COMPLIANCE AND MONITORING	11
5.1 TESTING FOR COMPLIANCE	11
SECTION 6 INSURANCE, INDEMNIFICATION AND BONDS OR	
OTHER SURETY	11
6.1 INSURANCE, INDEMNIFICATION AND BONDS OR	
OTHER SURETY	11